**CHAN YOKE CHIN**

**v.**

**PEGAWAI PEMEGANG HARTA MEWAKILI HARTA BENDA YAP SIN GUAN, SI BANKRAP & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2(S4)-21-83-1999]
22 MAY 2000

***LAND LAW:*** *Charge - Order for sale - Private treaty - Failure to efffect sale within time required - Composite settlement arrangement - Non-compliance - Whether chargee entitled to proceed with foreclosure proceedings*

The plaintiff and her husband were co-owners of a property ('the property'). The husband was adjudicated a bankrupt by the 2nd defendant to whom the property was charged.

This was the plaintiff's 3rd application to the court to sell the property by private treaty. The plaintiff earlier made two applications to the court and obtained two orders in respect of the same but was not able to effect the sale within the time frame given by the court in both instances. Thereafter, the 2nd defendant stipulated a composite settlement agreement for the plaintiff to comply with wherein by cl. 5 of the said agreement, the 2nd defendant was entitled to recover the full amount outstanding and to treat the said agreement as cancelled in the event of non-compliance. There was non-compliance and the issue was whether the 2nd defendant was entitled to proceed to enforce the charge by foreclosure proceedings.

**Held:**

**[1]** The plaintiff gave no reason why she did not move in respect of the two earlier orders given. The plaintiff had delayed the completion of the sale of the charged property by private treaty since the 1st order was made.

**[1a]** The plaintiff's explanation that the delay was due to the 1st defendant's (the official assignee of the property) failure to reply was settled by the plaintiff obtaining an order that the senior assistant registrar should sign the sales and purchase agreement in place of the 1st defendant. If the plaintiff's explanation that the delay in the signing of the said agreement was due to the delay in the extraction of the draft and the fair order was true, then the plaintiff made no effort to show what steps she took to expedite their extraction.

**[2]** The plaintiff could only sell the charged property by private treaty with the consent of the 2nd defendant. With the termination of the composite settlement arrangement, there was no longer any consent available from the 2nd defendant to the plaintiff to proceed with the sale by private treaty in respect of the said charged property. It remained therefore for the 2nd defendant to proceed to enforce the charge by way of foreclosure proceedings to sell the charged property by public auction. There was now no basis for the plaintiff to file this 3rd application since the consent of the 2nd defendant for a sale by private treaty was a pre-requisite.

**[3]** Sections 256-259 and ss. 260-265 of the National Land Code 1965 contemplate a sale by public auction only and the court has no power to order a sale by private treaty under any of the said sections. However, a chargor may *before* an order for sale has been made and with the consent of the chargee, sell the charged property by private treaty.

*[Application dismissed.]*

**Case(s) referred to:**
*Chung Khiaw Bank Ltd v. Lan Ah Yen & Anor [1989] 2 MLJ 147* ***(refd)***
*United Malayan Banking Corporation Berhad v. Chong Bun Sun & Anor [1994] 2 CLJ 673* ***(refd)***

**Legislation referred to:**
National Land Code 1965, ss. 256, 257, 258, 259, 260, 261, 262, 263, 264, 265

*For the plaintiff - Wong Kok Yih; M/s Darshan Chong & Co*
*For the defendants - Sutha Krishnasamy; M/s Ghani & Co*

*Reported by Usha Thiagarajah*

## JUDGMENT

**RK Nathan J:**

### *Facts*

The plaintiff is the wife of one Yap Sin Guan (Yap). Both are co-owners of premises known as No. 8, Jalan Awan Cempaka Satu, Overseas Union Garden, Off Jalan Klang Lama, Kuala Lumpur (the property). Yap has been adjudicated a bankrupt on 23 March 1989 by the 2nd defendant to whom the said property has been charged. The 1st plaintiff wrote numerous letters to the 1st defendant to obtain his consent as the official assignee to sell the said property by way of private treaty since June 1996 but to date the 1st defendant has not given his consent. Even the 2nd defendant's numerous letters to the 1st defendant has elicited no response.

In the meantime, to resolve the impasse the 2nd defendant wrote a letter dated 15 January 1997 to the plaintiff stating that the 2nd defendant had agreed to the plaintiff's proposal of a composite payment of RM175,000, whereby RM5,000 would be paid in two instalments and the balance of RM170,000 would be paid after selling the property by way of private treaty.

On 7 January 1997 by way of Originating Summons No: S5-25-28-96 (the 1st application) the plaintiff obtained an order for sale of the said property by way of private treaty. Notwithstanding the fact that the 1st defendant was absent, the court gave the 1st defendant the consent to sell, on behalf of Yap, his half share of the said property by way of private treaty. However, it was expressly ordered by the court that the sale by private treaty ought to be effected within six months from the date of the said order and that all proceeds from the said sale ought to be handed to the 2nd defendant in full settlement of the balance due.

Since the plaintiff was unable to effect the sale by way of private treaty within the said six months the plaintiff made a second application by way of Originating Motion No: S4-21-167-97 (the 2nd application). On 30 March 1998 the court made an order compelling the 1st defendant to give his consent for the sale by private treaty of the said property at a price of RM170,000 to one Kok Ken Seng. It was further ordered that if the 1st defendant failed to sign the sale and purchase agreement within three months from the date of the order, the Senior Assistant Registrar of the High Court (the SAR) be empowered to sign the sale and purchase agreement on behalf of the 1st defendant. It was further ordered that the entire proceeds of the sale be paid to the 2nd defendant in settlement of the loan arising out of the said charge and it was finally ordered that the sale by private treaty ought to be effected within six months of the date of the said order.

The sale and purchase agreement was only signed by all parties and in respect of the 1st defendant by the SAR, Kuala Lumpur on 13 November 1998. In the meantime, the purchaser, Kok Ken Seng, was only able to obtain a loan of only RM136,000 from the Malayan Banking Berhad to finance the purchase on 25 February 1999. Notwithstanding the delay, the 2nd defendant, by way of a letter dated 8 March 1999 said as follows:

> Please be informed that our clients are agreeable to your client's request for extension of time to pay to our clients the said composite sum of RM170,000.00 provided the purchaser pay to our clients an upfront of RM34,000.00 (refundable free of interest) being the difference of the loan amount of RM136,000.00 and composite sum of RM170,000.00 on or before **16 March 1999**.

The plaintiff was only able to send the said sum of RM34,000 by way of a letter dated 18 March 1999 and which said letter was received by the 2nd defendant's solicitors on 22 March 1999. The 2nd defendant's solicitors' reply letter dated 21 April 1999 reads as follows:

1. Our clients are agreeable in granting your clients an extension of 4 months from 21 April 1999 (expiring on 21 August 1999) to fully settle the balance sum of RM136,000.00.

2. In this respect our clients have reinstated the composite sum of RM175,000.00 as full and final settlement in the matter herein.

3. The sum of RM34,000.00 which was forwarded by your clients will be part of the composite settlement sum, and the said sum is non-refundable for whatever reason.

4. Your clients are to obtain a Court Order in respect of the extension of time.

5. The above is without prejudice to our clients' rights to recover the full amount outstanding and to treat the composite settlement as cancelled in the event of non-compliance by your clients of the abovementioned terms.

***The Application***

This is now the plaintiff's 3rd application in almost similar terms as sought in the earlier two applications except that in this application the plaintiff is also asking for an order for the extension of the sale and purchase agreement dated 13 November 1998.

***Findings Of The Court***

It is the plaintiff's case that since she is old and without money she could not afford to apply for a court order as directed by the 2nd defendant. Instead the plaintiff wrote two further letters dated 22 April 1999 and 3 May 1999 to the 1st defendant seeking his consent for the sale by private treaty. Finally the 1st defendant wrote to the plaintiff's solicitors on 7 July 1999 informing them that their application was being processed and that they would be notified of the outcome. The plaintiff is no doubt aware that there is an application already pending by the 2nd defendant seeking an order for sale of the said property by way of suit No: S3-21-123-95.

***Non-Response By The Official Assignee (OA)***

I am at a loss to understand why the OA has been unresponsive. It would seem that even in respect of the first two earlier applications the OA never even bothered to attend court notwithstanding the fact that the applications were

served on him. In fact it became even necessary for the plaintiff to have even obtained an order from the SAR to sign in place of the OA if he failed to sign the sale and purchase agreement within three months. And sure enough the OA did not sign the sale and purchase agreement, thus requiring the SAR to do the work of the OA. And finally the plaintiff wrote two letters dated 22 April 1999 and 3 May 1999 and it took the OA another two months to merely state that the application was being processed. This state of affairs must be put right. The OA has not even seen it fit to explain his lack of response in this matter, to the court.

However, the plaintiff's failure to obtain a court order for the consent which was a pre-requisite put paid to this application. If the plaintiff has the money now to make this application the plaintiff ought to have done so promptly when she received the letter dated 21 April 1999.

***The Delay***

The tardiness of the plaintiff in respect of the other two applications prevents this court from exercising its discretion to give her another order for sale. The plaintiff has given no reason nor any satisfactory explanation why she did not move in respect of the two earlier orders given. The plaintiff has delayed the completion of the sale of the charged property by way of a private treaty since 7 January 1997 when the 1st order was made. The plaintiff's explanation that the 1st defendant had failed to reply has been taken care of by the plaintiff, by obtaining an order that the SAR should sign the sale and purchase agreement in place of the OA. Then the plaintiff explains the delay in the signing of the sale and purchase agreement on 13 November 1998 by stating that this was due to the delay in the extraction of the draft and the fair order. It would seem to me that the plaintiff is blaming everyone else except herself. If what the plaintiff is stating is true that there was a delay in the extraction of the draft and the fair order, the plaintiff has made no effort to show what steps she took to expedite their extraction. Surely her solicitors could have seen the learned SAR concerned to explain the position and then she could have obtained the signed and sealed order in a day. These delays have not helped the plaintiff and in any case no satisfactory explanation has been given.

***The Termination***

In my view, the terms of the 2nd defendant's solicitors' letter dated 21 April 1999 are important. The plaintiff did not take any steps to apply to court for an extension of the 2nd order dated 30 March 1998 to be able to comply with the terms as stated in the letter dated 21 April 1999 and within the time frame granted by the 2nd plaintiff in the said letter dated 21 April 1999.

Therefore since as of 21 August 1999 (as stated in the said letter dated 21 April 99), the plaintiff had not complied with the terms of the said letter, the 2nd defendant, by its letter dated 3 September 1999 "terminated the composite settlement arrangement of RM175,000 with immediate effect …" pursuant to cl. 5 of the letter dated 21 April 1999. In fact by their solicitors' letter dated 19 August 1999 the 2nd defendant reminded the plaintiff of her obligations as stated in the 2nd defendant's letter dated 21 April 1999.

It is conclusive therefore that with the said termination of the composite settlement arrangement, there is no longer any consent available from the 2nd defendant to the plaintiff to proceed with the sale by private treaty in respect of the said charged property anymore. It remains therefore for the 2nd defendant to proceed to enforce the charge by way of foreclosure proceedings to sell the charged property by public auction. There is now no basis for the plaintiff to file this 3rd application before me, since the consent of the chargee for a sale by private treaty, is a pre-requisite. In fact in *Chung Khiaw Bank Ltd v. Lan Ah Yen & Anor* [1989] 2 MLJ 147 Wan Adnan J (as the learned Chief Judge, Malaya, then was) held that ss. 256-259 and ss. 260-265 of the National Land Code contemplate a sale by public auction only and that the court has no power to order a sale by private treaty under any of these sections. (See also *United Malayan Banking Corporation Berhad v. Chong Bun Sun & Anor* [1994] 2 CLJ 673.) However, in the *United Malayan Banking* case the court held that "a chargor may, before an order for sale has been made and with the consent of the chargee, sell the charged property by way of private treaty". It is therefore settled law that the plaintiff chargor can only sell the charged property by way of private treaty with the consent of the 2nd defendant/chargee.

As for the sums paid so far, the plaintiff is at liberty to raise this when the 2nd defendant moves the court for sale by public auction. In so far as this application goes, it stands dismissed with costs.